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In the Supreme Court of the United States

OCTOBER TERM, 1984

HUBERT WAYNE JOHNSON,

Plaintiff-Petitioner,

vs.

JOHN F. BEASLEY CONSTRUCTION COMPANY,
a Corporation,

Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether or not the Seventh Circuit Court of Appeals committed error when it created a new test to determine as a matter of law whether Plaintiff was a "seaman" within the meaning of the Jones Act when that new test is not only inconsistent with the Supreme Court's holdings on the subject as well as with other Circuits and Illinois law, but also establishes an ambiguous and confusing Jones Act standard which in essence denies an injured party a right to trial by jury.

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JURISDICTIONAL STATEMENT

Plaintiff petitions this Court for Writ of Certiorari pursuant to 28 U.S.C. §1254(1) and United States Supreme Court Rule 19.

STATUTE INVOLVED

46 U.S.C. §688:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United

States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185;
June 5, 1920, c. 250, § 41 Stat. 1007.

STATEMENT OF THE CASE

The complaint filed in the United States District Court, Central District of Illinois, alleged injury to Plaintiff occurring on July 13, 1981, upon the Illinois River near Pearl, Illinois. Plaintiff, who was injured while aboard a barge which was struck by another barge, based his cause of action upon the Jones Act, 43 U.S.C. §688, *et seq.*

The Defendant filed a Motion For Summary Judgment on the basis that Plaintiff was neither a seaman nor upon a vessel as required by the Jones Act. After reviewing the record, the District Court granted Defendant's Motion and entered Judgment for Defendant on November 10, 1983.

The Plaintiff appealed the District Court's Order to the Seventh Circuit Court of Appeals where oral argument was heard on April 13, 1984. The Court of Appeals rendered its opinion on August 24, 1984, ruling that the District Court was in error in finding the barge was not a vessel but that the Plaintiff was not a seaman thus affirming the Judgment For Defendant upon its Motion For Summary Judgment (742 F.2d 1054).

Plaintiff petitions this Court for a Writ of Certiorari pursuant to 28 U.S.C. §1254(1) and United States Supreme Court Rule 19. The facts material to the question presented for review are as follows.

Plaintiff Hubert Wayne Johnson was employed by the Defendant John F. Beasley Construction Company, a corporation, relative to the construction of a portion of a railroad bridge across the channel of the Illinois River near Pearl, Illinois. The bridge construction entailed removing the existing bridge and floating in the lift bridge without interrupting use of the bridge by the railroad. The machinery house for the lift bridge was being fabricated upon the barge identified as the "John F. Beasley, No. 15" (hereinafter referred to as the JFB-15).

The JFB-15 served multiple purposes in addition to being the situs for fabrication of the machinery house. The JFB-15 was used to transport material and people upstream, downstream, and across the river. The JFB-15 was used to store iron used in construction of the bridge as steel used on a bridge is not stored on the bank; rather, the steel comes to the site stored on barges in navigation as bridge iron cannot get muddy. The JFB-15 was equipped with a crane utilized in the loading and transporting activities of the barge. When the JFB-15 was not in transit up and down or across the river, it was tied off from falsework approximately seventy-five to eighty yards downstream from the bridge. The workers on the JFB-15 were transported to and from the barge daily. A tug was used to move the JFB-15 as it had no motive power of its own.

Plaintiff arrived at the construction project approximately two to three weeks before the accident. Plaintiff's work included drilling holes in the concrete piers over the water and bolting the machine house abroad JFB-15, but

primarily Plaintiff spent his time aboard the JFB-15 loading, unloading, and transporting iron up, down, and across the river and performing work incidental thereto.

A few days prior to the accident, the JFB-15 and two other empty barges were pushed downstream eight to ten miles to load iron. Plaintiff rode JFB-15 downstream preparing for the loading and storing of the iron. Upon arrival, Plaintiff remained on the barge assisting with loading and preparing the barge. On the third day, the barges were loaded and the trip upstream began; during the trip back Plaintiff worked with the loaded iron. During the trips downstream and upstream, Defendant admits Plaintiff performed some traditional navigational functions. On July 13, 1981, the JFB-15 was transported upstream and across the river. Plaintiff assisted with the tie-off of JFB-15. The JFB-15 was approximately eighty to one-hundred feet from land, and tied off to the falsework, and the barge was not stationary as it would float four to five feet.

Upon the JFB-15 was a piece of loose steel which in the future was to be used as a gangplank between it and other barges. The tug, "The Ironworker" was owned and piloted by Defendant's personnel, and was pushing another barge. The tug due to navigational error pushed the barge into JFB-15 striking the piece of iron which struck Plaintiff. The pilot of the tug had earlier that day slapped things two or three times. Plaintiff incurred injuries including amputation of his left leg.

ARGUMENT

THE SEVENTH CIRCUIT COURT OF APPEALS COMMITTED ERROR RESULTING IN THE NEED OF THIS COURT TO PROVIDE GUIDANCE AND CONSISTENCY WHEN THE SEVENTH CIRCUIT COURT OF APPEALS CREATED A NEW TEST TO DETERMINE AS A MATTER OF LAW WHETHER PLAINTIFF WAS A "SEAMAN" WITHIN THE MEANING OF THE JONES ACT WHEN THAT NEW TEST IS NOT ONLY INCONSISTENT WITH THE SUPREME COURTS' HOLDINGS ON THE SUBJECT AS WELL AS WITH OTHER CIRCUITS AND ILLINOIS LAW, BUT ALSO ESTABLISHES CONFUSING AND AMBIGUOUS STANDARDS WHICH IN ESSENCE DENIES AN INJURED PARTY A RIGHT TO TRIAL BY JURY.

The salient issue of this Petition For Certiorari is identified by the Seventh Circuit Court of Appeals in its opinion when it astutely observed that the term "seaman", which is not defined by the Jones Act, has been left to the courts to define and that the case law interpreting this term has never been applied in a consistent manner. Unfortunately, the Seventh Circuit Court of Appeals created a test to define the term "seaman" which is inconsistent with this Court's interpretation of the term, inconsistent with other Court of Appeal's interpretation as well as Illinois law and is internally inconsistent, ambiguous, and contrary to the spirit of the Jones Act. The opinion in the case at bar has, consequently, resulted in the need of this Court to address the definition of the term "seaman" so as to provide consistent guidelines to the Courts below, attorneys, and the industry.

The facts in the case under review reflect an injury resulting from a clear maritime risk—collision of two vessels upon navigable waters. The Court of Appeals did

not question the status of the barge upon which Plaintiff was injured as a "vessel" within the meaning of the Jones Act; in fact, the Appellate Court overruled the District Court's findings that the barge was not a vessel ruling:

> "The 'vessel in navigation' requirement pertains not to the vessel's mobility at the precise moment of injury, but to whether it has at times been employed as a means of transportation on water for passengers or cargo and has not been withdrawn from navigable waters and laid up, say, for the season." 742 F.2d at 1063.

However, the Appellate Court erroneously created a test to determine if there is an evidentiary basis for submitting to the jury the question based on whether the person was a member of the crew of a vessel at the time of injury, and this test deviated from this Court's precedent as well as that of other circuits. The error was compounded by the Appellate Court's failure to consistently apply its new test to the facts at bar.

The Seventh Circuit Court of Appeals acknowledging its departure from the criteria created by the Fifth Circuit in *Offshore Company* v. *Robison,* 266 F.2d 769 (5th Cir. 1959) established the following test:

> "Relying on the traditional three-prong test, but emphasizing the employee's duties as they relate to the transportation function of the vessel, we hold that in those equivocal situations there is an evidentiary basis for submitting to the jury the question whether the person was a member of the crew of a vessel at the time of injury if: (1) the person injured had a more or less permanent connection with a vessel in navigation, and (2) the person injured made a significant contribution to the maintenance, operation, or welfare of the transportation function of the vessel." 742 F.2d at 1062, 1063.

In essence, the Seventh Circuit Court of Appeals test emasculates the Plaintiff's right to a jury trial by empowering the Court as a matter of law to determine Plaintiff's "seaman" status by utilizing terms with more ambiguity than previously existed. When has a Plaintiff as a matter of law made a "*significant* contribution"? What as a matter of law constitutes a "transportation function"? Ironically, this test to determine whether or not to submit the case to the jury is to be applied only if the facts are of an equivocal nature.

This Court in its opinions wherein it defined and determined "seaman" status did not place undue weight upon the vessel's "transportation function" nor require Plaintiff as a matter of law to make a "significant" contribution to the "transportation function". Rather, this Court has held navigation embraces duties essential for other purposes of the vessel other than being limited to "putting over the helm."

This Court has historically recognized that various vessels have various functions and that one's status as a seaman must be defined in reference to the vessel upon which he is working when injured. In *Norton* v. *Warner Co.*, 321 U.S. 565 (1943), this Court addressed the definition found in *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U.S. 251 (1940) of "crew" as being those "who are naturally and primarily on board" the vessel "to aid in her navigation". The injured party in *Norton, supra,* was a bargeman whose duties were taking general care of the barge. In finding the injured party to be a member of the "crew" this Court stated "certainly members of the crew are not confined to those who can "hand, reef and steer" 321 U.S. at 572. The Court observing that vessels have several purposes ruled:

> "He performed on the barge functions of the same quality as those performed in the maintenance and operation of many vessels. His were indeed different from the functions of any other "crew" only as they were made so by the *nature of the vessel and its navigational requirements.*" 321 U.S. at 572 (emphasis added).

The Supreme Court in *Norton, supra,* rejected the Seventh Circuit Court of Appeals limitation to those as seaman who make a significant contribution to the transportation function by expressly refusing to confine the members of the crew to those who can "hand, reef and steer".

Again the United States Supreme Court rejected a narrow interpretation of seaman in *Gianfala* v. *Texas Co.,* 350 U.S. 879 (1955). The Court's Per Curiam Opinion reversed the Fifth Circuit's ruling that there could be no recovery under the Jones Act for decedent's death as he was abroad the drilling barge not as a member of a ship's crew but as a member of a drilling crew. In *Gianfala* the decedent worker was a member of a drilling crew on a barge which was sunk to the bottom with tons of water holding it fast, and Plaintiff's decedent was killed when hit by pipe he was unloading from a barge onto the drilling barge (*Texas Company* v. *Gianfala,* 222 F.2d 382 (5th Cir. 1955)). The Per Curiam Opinion cited as authority for reversal of the Fifth Circuit, the cases of *Summerlin* v. *Massman Const. Co.,* 199 F.2d 715 (4th Cir. 1952), *Wilkes* v. *Mississippi River Sand & Gravel Co.,* 202 F.2d 383 (4th Cir. 1953) (Note, Cert. denied 346 U.S. 817), *Gahagan Construction Corp.* v. *Armao,* 165 F.2d 301 (1st Cir. 1948), and the Court's prior case of *South Chicago Coal & Dock Co.* v. *Bassett,* 309 U.S. 251 (1940).

The aforesaid cases cited with approval by the United States Supreme Court in *Gianfala, supra,* were the identical cases relied upon by the Supreme Court when the Court

last addressed the definition of "seaman" in 1958. In both *Grimes* v. *Raymond Concrete Pile Co.*, 356 U.S. 252 (1958) and *Butler* v. *Whiteman*, 356 U.S. 271 (1958), the Supreme Court held that the issue of whether Plaintiff was a member of a crew was one for the trier of fact citing *Senko* v. *LaCrosse Dredging Corp.*, 352 U.S. 370 (1957); *Gianfala, supra,* and *Bassett, supra.* The aforesaid cited cases were the precedent relied upon by the Fifth Circuit in developing the test presently followed by the majority of the circuits in *Offshore Company* v. *Robison*, 266 F.2d 769 (5th Cir. 1959).

The Court in *Robison, supra,* found in the above-cited cases the following common denominator as to the Plaintiff's status as a seaman:

> "The claimants are not ordinarily thought of as 'seaman' aboard 'primarily in aid of navigation', although they may serve the vessel in the sense that the work they perform fits in with the function the vessel serves. Gianfala was a member of a drilling crew on a submersible barge, Summerlin a fireman on a derrick, Wilkes a common laborer on a dredge, Gahagan a deckhand on a dredge. They had absolutely nothing to do with navigation, as such, nothing to do with the operations or welfare of a vessel in the sense that a vessel is a means of transport by water, and were not members of a ship's company in the sense that ship's cook or carpenter are necessary or appropriate members of a ship's complement. But in light of the function or mission of the special structure to which they were attached, they served in a capacity that contributed to the accomplishment of its mission in the same way that a surgeon serves as a member of the crew of a floating hospital." 266 F.2d at 776.

Relative to the issue of "vessel" in the above-cited cases, the Court in *Robison, supra,* stated:

> "The 'vessels' were not conventional vessels but special-purpose structures that in one case was on the

> bottom of the sea. In other words, under the Jones Act a vessel may mean something more than a means of transport on water." 266 F.2d at 776.

Consequently, the *Robison* test evolved that there is an evidentiary basis for a Jones Act case to go to the jury:

> "(1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips." 266 F.2d at 779.

Further, the Court in *Robison, supra,* held that the terms "seaman", "vessel", "member of a crew" have such a wide range of meaning under the Jones Act as interpreted in the courts that ". . . except in rare cases, only a jury or trier of facts can determine their application in the circumstances of a particular case. Even where the facts are largely undisputed, the question at issue is not solely a question of law when, because of conflicting inferences that may lead to different conclusions among reasonable men, a trial judge cannot state an unvarying rule of law that fits the facts". 266 F.2d at 779, 780.

The *Robison* test and holding that the status of "seaman" is preferably to be made by the trier of fact has been adopted in the First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Ninth Circuit as well as by the State Court of Illinois (*Bennett* v. *Perini Corporation,* 510 F.2d 114 (1st Cir. 1975); *Hartley* v. *Peter Kiewit Sons' Co.,* 543 F.Supp. 401 (E.D.N.Y. 1982); *Mietla* v. *Warner Company,* 387 F.Supp. 937 (E.D.Pa. 1975); *Garrett* v. *Gutzeit* O/Y, 491

F.2d 228 (4th Cir. 1974); *Hall* v. *Diamond M Co.*, 732 F.2d 1246 (5th Cir. 1984); *Searcy* v. *E. T. Slider, Inc.*, 679 F.2d 614 (6th Cir. 1982); *Brinegar* v. *San Ore Construction Company*, 302 F.Supp. 630 (E.D.Ark. 1969); *Johnson* v. *American Pile Driving Co., Inc.*, 397 F.Supp. 11 (W.D. Wash. 1975)—Note Plaintiff failed to provide facts in *Johnson* to show he was assigned permanently to the vessel, and that issue by stipulation is not a matter for summary judgment in the case at bar; *Berry* v. *American Commercial Barge Lines*, 114 Ill.App.3d 354, 450 N.E.2d 436 (1983)).

Clearly the Seventh Circuit Court of Appeals admitted departure from the *Robison* test and holding is inconsistent with the majority of the circuits. That departure is a basis for this Court to grant the Writ of Certiorari and end the inconsistency created by the Seventh Circuit particularly in light of the fact that the issue was last addressed by this Court in 1958. Moreover, the Seventh Circuit Court of Appeals' decision in the case at bar is contrary to the rulings and spirit of the holding made by this Court in 1958 and prior thereto.

Not only did the Seventh Circuit create a test inconsistent with precedent but also in its *ex-post-facto* application at bar did so inconsistently. The Appellate Court recognized that the injured employee does not cease becoming a member of a crew if the vessel is docked or anchored at the moment of injury thus acknowledging that the Jones Act is not limited to injuries occurring during actual transport. However, the Appellate Court requires Plaintiff to be a "seaman" he must make a significant contribution to the transport function, but the Court provides absolutely no guidelines as to what constitutes "transportation function".

"Transportation function" cannot be limited solely to assisting with the motive power of the vessel. The law is well settled that the phrase "primarily in aid of navigation" has been construed to include such personnel as hairdressers (*Mahramas* v. *American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165 (2nd Cir. 1973) and waitresses *Buford* v. *Cleveland and Buffalo Steamship Co.*, 192 F.2d 196 (7th Cir. 1951). The weight of authority establishes all that is necessary is that the duties of the Plaintiff must have contributed to the vessel's function or to the accomplishment of its mission. This well-established standard was completely ignored by the Seventh Circuit Court of Appeals in rendering a new test which results in an unjust and irreconcilable departure from precedent and the remedial purpose of the Jones Act.

A collision between two barges is navigable waters causing severe personal injury to a workman on one of the barges should be a fundamental Jones Act application. The denial of Jones Act protection by the Seventh Circuit emasculates the clear intent of the Act and creates precedent that removes an entire industry from the remedial protection of the Jones Act that has been established since 1915. The Supreme Court has not ruled upon the subject since 1958 and guidance in the industry is necessary because the Federal Circuits are now applying different legal requirements for protection under the Jones Act. It is grossly unfair for a severely injured workman in Illinois to be deprived of Jones Act protection when the same workman in the majority of States would be awarded a jury trial pursuant to the Act.

Plaintiff respectfully requests this Court to grant his Petition for Certiorari because the Seventh Circuit Court of Appeals' decision is irreconcilable with this Court's

prior opinions and is inconsistent with the decision of the majority of the other Federal Circuits. The Seventh Circuit decision is further inconsistent with the State Law of Illinois where the injury occurred and adds ambiguity to prior precedent, and unjustly deprives Petitioner of his statutory right to a jury trial under the Jones Act for an injury resulting from a maritime risk.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

HUBERT WAYNE JOHNSON,

Plaintiff,

No. 83-1154 v.

JOHN F. BEASLEY CONSTRUCTION COMPANY, a corporation,

Defendant.

DECISION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

Jurisdiction in this cause is grounded on the Jones Act, 43 U.S.C. § 688, *et seq.*[1] The complaint alleges that plaintiff, on July 13, 1981, was an employee of Beasley, engaged in the performance of his duties on a "vessel" in the Illinois River;[2] that he, then and there, was a "seaman" on the alleged vessel, engaged in the furtherance of the mission of the vessel in navigation; that he, while working on a "barge," was injured when another barge which was operated by Beasley collided with the barge

[1] "Any seaman who shall suffer personal injury in the course of his employment may * * * maintain an action for damages at law" against his employer. 43 U.S.C. § 688.

[2] It is noted that the complaint does not specifically allege that the barge was, at the time of the occurrence, either owned, operated or controlled by Beasley. Since it is admitted that the barge was owned and controlled by Beasley, that omission is insignificant.

upon which he was working, and that his injury proximately resulted from one or more of alternatively-alleged acts of negligence on the part of Beasley. He prays monetary damages for his personal injury.[3]

Beasley filed a motion for summary judgment in its favor.[4] Resolution of the issue presented by that motion must proceed from an analysis of the burden of proof which a plaintiff must bear to sustain his claim of a right to maintain a cause of action under the Act. Initially, a plaintiff who invokes the Act must allege and prove that he was a seaman and that he suffered an injury as a result of the negligence of the owner or operator of a vessel upon which he was employed at the time when the injury occurred. *E.g., Holland* v. *Allied Structural Steel Co., Inc.*, 539 F.2d 476 (5th Cir. 1976), *cert. denied*, 429 U.S. 1105. Because the term "seaman" is not defined by the Act, the courts have held that the issue whether a plaintiff in a Jones Act case was a seaman presents a mixed question of law and fact which must be decided by a factual determination in each given case. *E.g., Offshore Company* v. *Robison*, 266 F. 2d 769 (5th Cir. 1959). In any case in which the operative facts are substantially undisputed, and

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[3] The file does reflect that plaintiff was awarded substantial sums for worker's compensation and for his medical expenses. However, that fact has no bearing upon his entitlement to maintain a Jones Act suit if the factual circumstances are such as to invoke the provisions of the Act.

[4] It supports its motion by the affidavit of James A. McGraw, its superintendent upon the job site, which incorporates copies of certain documents from Beasley's employment records, and the affidavit of Elmer Ogle who was a deck hand upon the moving barge which was involved in the collision. It principally relies upon the evidence deposition of the plaintiff as proof positive that there is no genuine issue as to any material fact, and for proof that plaintiff was not a seaman within the contemplation of the Jones Act.

in which those undisputed facts can lead to only one rational inference, the issue becomes solely a question of law which is amenable to resolution on a motion for summary judgment. *E.g., Barrios* v. *Engine and Gas Compressor Service, Inc.*, 669 F.2d 350 (5th Cir. 1982); *Lawrence* v. *Norfolk Dredging Company*, 319 F.2d 805 (4th Cir. 1963).

Who is a seaman for purposes of Jones Act entitlement? Courts have held that a seaman is a person who is a member of a crew who has a more or less permanent connection with a floating structure, which is a vessel in navigation and on which he is employed to work on the vessel in aid of its navigation. *E.g., Lewis* v. *Roland E. Trego & Sons, Inc.*, 359 F. Supp. 1130 (D. Md. 1973), *aff'd in part, vacated in part*, 501 F.2d 372 (4th Cir. 1974); *Baker* v. *Pacific Far East Lines, Inc.*, 451 F. Supp. 84 (N.D. Cal. 1978). A plaintiff has the burden of proving each of those elements to sustain his claim that the Act does provide a remedy.

The one cited case from the Seventh Circuit dealt collaterally with the Jones Act. *South Chicago Coal & Dock Co.* v. *Bassett*, 104 F.2d 522 (7th Cir. 1939), *aff'd*, 309 U.S. 251 (1940). That suit arose under the Longshoremen's and Harbor Workers Compensation Act. Bassett, at the time of his injury, had the primary duty aboard a vessel of facilitating the flow of coal from that vessel to another which was then being refueled. Recognizing that the Longshoremen's Act and the Jones Act provide mutually exclusive remedies, the court said that the Jones Act covers those persons who make up the ship's complement, i.e., those who are regularly engaged in seafaring and navigation of the ship, as opposed to those who are assigned tasks "which might as well have their background on shore." In that context, the court said:

> "* * * The task of prodding coal down a runway might just as well have as its background a coal truck, a roundhouse, or a mine, as a steamship. [Bassett's work] was an ordinary laborer's job, and it was merely happenstance that the location of this position was on shipboard." 104 F.2d at 528.

The cited decision which is factually most closely relater to this cause is *Mellon* v. *John F. Beasley Construction Company,* 1981 A.M.C. 549 (D. Md. 1980), *aff'd,* 661 F.2d 924 (4th Cir. 1981), *cert. denied,* 454 U.S. 1033. An iron worker who was injured when he fell from the structure of a bridge under construction filed a suit under the Jones Act. His claim rested upon the fact that the work was being performed with the aid of a crane-bearing barge which was employed as a necessary tool of the construction project. Summary judgment was granted for the defendant. The court held that the plaintiff was not a seaman in that his primary duties were those of an iron worker on a bridge construction project, and that any tasks which he might have from time to time performed, which partook of the character of navigational activity, were wholly incidental to the primary purpose for his employment. A like decision was reached in *Lynn* v. *Heyl & Patterson, Inc.,* 483 F. Supp. 1247 (W.D. Pa. 1980), *aff'd,* 636 F.2d 1209 (3d Cir. 1980), the court holding that the plaintiff was an iron worker, not a seaman, even though he had occasionally performed tasks which are normally associated with the navigation of a vessel.

For purposes of the pending motion, Beasley concedes that there does exist a material question of fact as to the first element in the definition of the term "seaman" within the above legal context, i.e., that plaintiff did have, at the time of his injury, a more or less permanent connection with JFB-15, the barge upon which he was working. However, it contends that undisputed facts, based largely upon

plaintiff's deposition testimony, preclude any inference that he can meet the other two criteria of that definition, namely, that JFB-15 was a vessel in navigation and that plaintiff was employed to perform tasks aboard JFB-15 in aid of its navigation. Its contentions in that regard must be sustained. There is no factual dispute as to the circumstances of the precipitating event. There is only contention as to permissible inferences which may be drawn from the undisputed facts.

Beasley is a steel construction contractor. At the time of this occurrence, it was engaged in the performance of a contract to complete the iron work required to remove a swing span from a railroad bridge over the Illinois River at Pearl, Illinois, and to replace the same with a lift span to bridge the navigation channel of the river. Its contractual undertaking involved the removal of the swing span and the steel construction required to replace the same with a lift span. Critical to this cause, Beasley's undertaking, once the swing span had been removed, was the erection of the structural steel for the lift span and the construction of a control house which was designed to house the lift span machinery.

The structural work could not be wholly done in place, because that construction would have had the effect of blocking the river channel. The plans called for the construction of the lift span atop falsework and the control house, both outside the channel for navigation, and the flotation of those components into place for incorporation into the bridge after the basic structural work had been completed. The falsework for construction of the span was positioned closely adjacent the west bank of the river, in close proximity to the bridge itself. For the same reason the control house structure was to be fabricated outside the channel before the same was incorporated into the new bridge structure.

Because the work was to be performed over water, Beasley had brought to the site, in advance of July 13, 1981, several barges and barge-like floating structures and the tugboat "Iron Worker" for use in the completion of the project. Those units included JFB-15. That unit is most accurately described as a floating work platform, a large, steel-decked, barge-like unit which was designed to accommodate a large crane, and to provide a floating platform upon which, and from which, steel structural work could be performed. It had no motive power, no steering capability, no cabins or residence facilities, no kitchen or galley, no means for fresh water storage, no permanent toilet facilities, and no fixed navigational lights. Employees assigned to work aboard JFB-15 were transported daily to their station and removed daily at shift's end from the barge to shore.

On and for several days prior to July 13, 1981, plaintiff was the foreman of a gang assigned to work aboard JFB-15. The specific project then ongoing was the construction of the control house which was being constructed aboard the barge. The principal function of JFB-15 was the provision of a base upon which the control house would be constructed and from which the erection of the structural steel of the lift span would be performed. At the time of the occurrence which gave rise to this cause, JFB-15 was tied off to the falsework near the west bank of the river. The barge was then laden with stacked steel components which were designed for both the construction of the control house and the later construction of the lift span.

Included among the steel aboard was a large member characterized by plaintiff as a H-beam which the gang used as a companionway between JFB-15 and adjacent steel-bearing barges as the need arose. It must be inferred from plaintiff's deposition that neither he nor anyone else

was aware at the critical time that that beam was so positioned that a part of it extended over the side of the barge which faced the river channel.

At the critical time, plaintiff was standing between the crane and the partially-completed control house, conferring with certain members of his gang regarding a component of the control house which had been either misfabricated or faultily installed into the structure. At the same time, the tug "Iron Worker" was engaged in pushing two barges loaded with steel to the construction site on the west bank. The lead barge collided with the end of the steel beam which extended out over the water. That collision resulted in plaintiff's left leg being entrapped between that beam and other steel components which were stacked aboard the barge. He was grievously injured. Although extensive medical procedures were employed in an attempt to save the leg, it finally became necessary to amputate the leg below the knee. His right to maintain a cause of action against Beasley is patent if he can qualify to invoke the provisions of the Act.

The critical inquiry required by the principles enunciated in *Bassett, Mellon,* and other cases cited above, must be directed to an evaluation of the scope of plaintiff's employment in furtherance of Beasley's undertaking. Plaintiff's employment history, the facts as to the functional purpose of JFB-15, the manner in which it was being employed by Beasley, and a delineation of the crafts employed by Beasley on the project, are all relevant to that inquiry.

Excluding management personnel, Beasley employed workers from three separate trades on the project. A majority of such employees, including plaintiff, were members of the International Association of Bridge Structural and Ornamental Iron Workers, an international union.

In addition to iron workers, its work force included members of the Operators and Oilers Union, who operated the cranes and the tugboat, and Laborers Union personnel. Among other assignments, the latter worked as deck hands aboard the tug and the barges when the same were in transit.

Plaintiff testified on deposition that he had been a member of the Iron Workers Union since about 1962. He further stated that he had never been affiliated with any maritime union and that he had never been certificated by the Coast Guard or other regulatory authority for any type of maritime employment.

He began working in the craft of steel construction in 1962, shortly after he had graduated from high school. Between 1962 and July, 1981, he had been employed by Beasley and several other steel construction contractors on numerous projects. Those projects included the erection of structural steel for high-rise buildings, power houses, communication sites, communication towers, and several bridges. He had been assigned to various particular functions from time to time upon those various stints of employment, which were all directly related to the erection of structural steel. With minor exceptions, he had been employed exclusively by Beasley upon a number of construction projects during the period from 1971 to the date of his injury.

He had been employed on the Pearl bridge project for only a few days before he suffered the injury which gave rise to this complaint. He was assigned to work as a foreman of a gang which worked for the most part from the deck of JFB-15. His gang had helped to remove the old swing span from the channel of the river. When that had been completed, the gang was given two particular

work assignments. First, it was to construct the steel for the control house. Second, it was to assist in the erection of the structural steel for the lift span. They were also employed from time to time unloading fabricated steel from trucks on shore onto barges or to other locales conveniently adjacent the bridge site.

Nothing in plaintiff's deposition testimony can create any doubt as to the character of JFB-15. Irrespective the question whether it could ever partake of the character of a "vessel" within the intendment of the Act, it was designed, constructed and employed as a floating platform from which the erection of structural steel over water might be achieved. Clearly, it was not necessarily a stationary platform. Its critical element was the heavy-duty crane which was designed for the lifting, movement, and placement of heavy steel components. It was pushed by tug from place to place upon the river, consistently with the need for the use of its crane. During the few days of plaintiff's employment which preceded his injury, JFB-15 had been moved by tug to the east bank of the river, and to a point about eight miles south of the bridge site, to make its crane available for the movement of steel and the unloading of steel from shore onto barges to make the same conveniently available to meet the requirements of the construction project. It is presumed that plaintiff and his gang were aboard JFB-15 during each of those movements.

While JFB-15 was in transit, the tug which provided the motive power was crewed by workmen from the Operating Engineers. The deck hands assigned to the tug and its tow were laborers, not associated with the iron workers craft. Plaintiff described the activities of his gang during such movements as limited to riding to the required work

site, or to the arrangement and preparation of the tools and equipment which the gang would need for the unloading of steel when their destination was reached. He did testify that he and others in his gang had at times cast lines and helped to secure lines to aid the deck hands in tying off the unit at its destination. He testified to no other activity by any iron worker which is even remotely related in any significant way to the physical act of moving JFB-15 from one place to another as the need arose.

It must be found and concluded that plaintiff's own deposition completely refutes his allegation that he was employed by Beasley as a seaman, or that he had worked as a seaman at any time within the context of his employment on the project. He was employed as an iron worker. He worked as an iron worker. The fact that he did occasionally aid the deck hands in securing JFB-15 at various locations was a casual undertaking which was wholly coincidental to the achievement of the purpose for which he and his gang were employed. Plaintiff testified on deposition that the control house and the lift span could have been constructed on land as well as upon or over water. The fortuitous circumstance that he was working upon a floating platform at the time of his injury cannot constitute him a seaman within the intendment of the Act.

Plaintiff's deposition also fully supports only the inference that JFB-15 was not a vessel in navigation in the context of the event of plaintiff's injury. It was at that time a stationary platform secured to the falsework near the river bank. Its only function was that of a platform to facilitate the erection of structural steel. Although it was floating upon a navigable stream, it cannot be found to have been in navigation. Like the circumstances in

Bassett, it is a mere happenstance that plaintiff's work place was on the water instead of on land.[5]

Relevant facts are found and applicable conclusions of law are stated in the foregoing narrative context. There remains no genuine issue of material fact which would require that this cause remain pending for trial.[6] Summary judgment must be entered for the defendant and against the plaintiff.

According, IT IS ORDERED that defendant's motion for summary judgment is ALLOWED, and judgment will enter for defendant, defendant to recover its costs of suit.

/s/ *Robert D. Morgan*
Robert D. Morgan
United States District Judge

Entered: November 10, 1983

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[5] It is conceivable that circumstances could arise in a context different from that presented here, under which JFB-15 might be found to be a vessel, or that such circumstances might present a factual question which would require a trial. However, given the undisputed circumstances surrounding this injury, no inference can possibly be drawn that JFB-15 was a vessel in navigation at the time when plaintiff was injured.

[6] Although reliance has been placed solely upon the deposition testimony of plaintiff, it is noted that the facts stated are supported by the affidavits on file and by copies of employment records which are appended to the affidavit of Mr. McGraw.

In the United States Court of Appeals For the Seventh Circuit

No. 83-3196

HUBERT WAYNE JOHNSON,

Plaintiff-Appellant,

v.

JOHN F. BEASLEY CONSTRUCTION COMPANY, a Corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of Illinois.
No. 83-1154 — Robert D. Morgan, *Judge.*

ARGUED APRIL 13, 1984 — DECIDED AUGUST 24, 1984

Before WOOD and CUDAHY, *Circuit Judges,* and NICHOLS, *Senior Circuit Judge.**

WOOD, *Circuit Judge.* On July 13, 1981, appellant Hubert Johnson sustained injuries while working on a construction barge owned by appellee Beasley Construction Company ("Beasley"). Appellant sued Beasley under the Jones Act, 46 U.S.C. § 688, and Beasley moved for sum-

* The Honorable Philip Nichols, Jr., Senior Circuit Judge for the United States Court of Appeals for the Federal Circuit, is sitting by designation.

mary judgment on the ground that appellant was not a "seaman" as required under the Act. The district court granted Beasley's motion and entered judgment in its favor. We affirm.

I.

The facts are not in dispute. Beasley is a structural steel contractor. It was hired to remove the swing span portion of a railroad bridge over the Illinois River at Pearl, Illinois, and to replace that span with a lift section to facilitate navigation in the river channel (the existing swing span rested in a pier-supported turntable that created an obstruction in the middle of the navigation channel.) The lift section was to be raised by machinery situated in a control house set on concrete pedestals on the south side of the bridge. Because the navigation channel had to remain unobstructed during the time Beasley was constructing the lift section, the lift section had to be assembled on the west bank of the river on falsework downstream from the bridge crossing (the falsework consisted of towers made of steel braces set upon pilings that had been driven into the river bottom). Following construction of the left section, it was to be floated into the gap left by the removal of the swing span and then hoisted into place for incorporation into the existing bridgework.

Appellant was a foreman in charge of a crew whose responsibilities were to construct the lift section and the control house. Because the work was to be performed over water, Beasley employed several barges and a tugboat. One of the barges, called the JFB-15, was a steel-decked floating work platform on which had been installed a large lifting crane. The JFB-15 measured 135 feet by 40 feet by 8 feet, and had a displacement of 405 tons. It had no motive power of its own and no steering capa-

bility, and was not equipped with cabins, galley, fresh water storage, permanent toilets, or fixed navigational lights. The workers on the JFB-15 were transported to and from the barge daily.

The primary role of the JFB-15 was to provide a site for the assembly of the control house and to assist in the construction of the lift section on top of the falsework. The JFB-15 was also used to transport iron to the work site. On these occasions, a tugboat would push the barge downstream to point where the supply trucks could get close enough to be reached with the crane. Appellant and his crew would assist with loading and preparing lines to shore. Thereafter, the tugboat would push the barge back upstream.

On July 13, 1981, the day of appellant's injury, the specific project then ongoing was the construction of the control house. The JFB-15 was moored 80 to 100 feet from the shore at the edge of the river channel. Appellant was supervising the construction of the control house when Beasley's tugboat collided with a 2,000 pound beam protruding over the edge of the JFB-15. The beam pivoted after being struck and caught appellant's left leg, causing severe injury that eventually resulted in amputation of the leg. Appellant has received Illinois worker's compensation for his injury, but brought this suit because the Jones Act would allow him to recover traditional tort damages.

II.

Claims brought under the Jones Act have not been litigated frequently in this circuit. We take this opportunity, therefore, to review briefly the development of the law in this area and what we believe to be the revelant and controlling principles. The Jones Act, 46 U.S.C. § 688, provides in relevant part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury and in such action all statutes of the United States modifying or extending the common law of right or remedy in cases of personal injury to railroad employees shall apply. . . .

Under this Act, the prior maritime law of the United States was modified to give seamen the rights given to railway employees under the statutes comprising the Federal Employer's Liability Act, 45 U.S.C. §§ 51-60, which provide a right of action by a railway worker for damages arising from the negligence of the owner of a railway on which the worker was employed at the time of the accident. *See Lindgren* v. *United States*, 281 U.S. 38, 40 (1930). Applying the principles of the railway statutes, the Supreme Court early on extended coverage under the Jones Act "to the liability of the owners of vessels for injuries to seamen extending territorially as far as Congress can make it go," *id.* at 47, consistent with admiralty jurisdiction.[1]

Because the term "seaman" is not defined by the Jones Act, it has been left to the courts to define the compass of this term. Unfortunately, however, the case law interpreting the Jones Act has never been applied in a consistent manner. Not long after passage of the Act, the Supreme Court held that the term "seaman" was broad enough to include even longshoremen who were employed in maritime work on navigable waters, as their work was "a maritime service formerly rendered by the ship's crew."

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[1] "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C. § 740.

International Stevedoring Co. v. *Haverty,* 272 U.S. 50, 52 (1926). This decision "could have led, with the greatest of ease, to the conclusion that all maritime workers injured in the course of their employment were Jones Act seamen." G. Gilmore & C. Black, *The Law of Admiralty* § 6-21, at 330 (2d ed. 1975). The next year, however, Congress enacted the Longshoremen's and Harborworkers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901 *et seq.,* which provides for the payment of compensation to all maritime workers injured upon navigable waters, regardless of the negligence of their employers, except to an employee who is "a master or member of a crew of any vessel." Through judicial interpretation, the phrase "member of crew of any vessel" eventually became equated with the term "seaman," *see Swanson* v. *Marra Brothers, Inc.,* 328 U.S. 1, 7 (1946); *Senko* v. *LaCrosse Dredging Corp.,* 352 U.S. 370, 371 (1957), thus making coverage under the acts mutually exclusive. The route by which the terms became equated is important because it sheds light on the ambit of Jones Act coverage.

In *South Chicago Coal & Dock Co.* v. *Bassett,* 309 U.S. 251 (1940), the Supreme Court was faced with the question whether an employee who worked on a vessel used for fueling steamboats and whose chief task was to facilitate the flow of coal from his vessel to the boat being fueled was a member of a crew of the vessel and thus excluded from coverage under the LHWCA. The employer argued that the question whether the employee was a member of a "crew" was a question of law. The Court, however, concluded that "the word 'crew' does not have an absolutely unvarying legal significance." *Id.* at 258. Accordingly, the determination whether a person is a "member of the *crew,*" a word that has a "wide range of variation," *id.,* as a question of fact to be left to the trier

of fact. The Court did observe, however, that as used in the statute, "crew" appeared to mean "employees on the vessel who are naturally and primarily on board to aid in her navigation." *Id.* at 260. It concluded that because the employee's duties "did not pertain to navigation, aside from the incidental task of throwing the ship's rope or making the boat fast," *id.*, and because he had no duties while the boat was in motion, his position was that of a longshoreman or other casual worker on water and thus covered by the LHWCA.

Bassett was relied on in another LHWCA case, *Norton* v. *Warner Co.*, 321 U.S. 560 (1944). In *Norton*, the employee worked on a barge as a boatman; his duties consisted of taking general care of the barge. In determining whether he should be excluded from coverage under the LHWCA, the Court concluded:

> If a barge without motive power of its own can have a "crew" within the meaning of the Act and if "crew" may consist of one man, we do not see why [the boatman] does not meet these requirements. . . . We said in the *Bassett* case that the term "crew" embraced those "who are naturally and primarily on board" the vessel "to aid in her navigation." [309 U.S. at] 260. But navigation is not limited to "putting over the helm." It also embraces duties essential for other purposes of the vessel. Certainly members of the crew are not confined to those who can "hand, reef and steer." Judge Hough pointed out in *The Buena Ventura*, 243 F. 797, 799, that "every one is entitled to the privilege of a seaman who, like seamen, at all times contributes to the labors about the operation and welfare of the ship when she is upon a voyage." And see *The Minna*, 11 F. 759; *Disbrow* v. *Walsh Bros.*, 36 F. 607, 608 (bargeman). We think that "crew" must have at least as broad a meaning under the Act. . . .

> [The boatman here] performed on the barge functions of the same quality as those performed in the maintenance and operation of many vessels. His were indeed different from the function of any other "crew" only as they were made so by the nature of the vessel and its navigational requirements.

321 U.S. at 572 (footnote omitted).

The Supreme Court in both *Bassett* and *Norton,* however, did not explicitly equate "seaman" under the Jones Act with "member of a crew" under the LHWCA. Indeed, in *Norton* the Court observed that " '[s]eaman' as used in a particular context may of course have a broader meaning than 'crew.' " 321 U.S. at 572 n.5 (citations omitted). Two years later, however, the Court took the step of equating the two terms. After reviewing the reach of the LHWCA, the Court in *Swanson* v. *Marra Brothers, Inc.,* 328 U.S. 1 (1946), concluded that "[w]e must take it that the effect of these provisions of the Longshoremen's Act is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters. . . ." *Id.* at 7.[2] In commenting on *Swanson,* we stated in *Desper* v. *Starved Rock Ferry Co.,* 188 F.2d 177 (7th Cir. 1951), *aff'd,* 342 U.S. 187 (1952), that:

> This decision clearly demonstrates that, since the passage of the Longshoremen's Act, the court has retreated from the position taken in the Haverty case [*International Stevedoring Co.* v. *Haverty,* 272 U.S. 50 (1926)] and has narrowed the Jones Act concept of "seaman" to the point where it includes only one who is a member of the crew of a vessel plying in navigable waters.

Id. at 180.

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[2] This view was subsequently ratified in *Senko*: "To recover [under the Jones Act] . . . petitioner had to be a member of a crew, as that term is used in the Longshoremen's Act, at the time of his injury." 352 U.S. at 371.

These general parameters were taken by the appellate courts and put into a three-prong test that has become the touchstone of Jones Act analysis. This test, as articulated in *Wilkes* v. *Mississippi River Sand & Gravel Co.*, 202 F.2d 838 (6th Cir. 1953), states that whether a claimant under the Jones Act is a member of a crew is "primarily a question of fact" to be considered in light of three requirements: "(1) that the vessel be in navigation; (2) that there be a more or less permanent connection with the vessel; and (3) that the worker be aboard primarily to aid in navigation." *Id.* at 388; *accord McKie* v. *Diamond Marine Co.*, 204 F.2d 132, 136 (5th Cir. 1953). *See* 1B *Benedict on Admiralty* § 11a, at 2-5 (7th ed. 1976). Because this test rests on several unexplained definitions such as "vessel in navigation" and "aid to navigation," however, it has never been applied consistently or literally. Indeed, in construing the third requirement, the *Wilkes* court itself noted that it should not be confined to those who "hand, reef and steer," but is applicable "to all whose duties contribute to the operation and welfare of the vessel," 202 F.2d at 388, relying on the Supreme Court's statements in *Norton.*

The Supreme Court has never given any more precise meaning to these requirements. Although certain classes of persons, such as passengers, guests and trespassers, are clearly excluded from coverage because the Act requires that the "seaman" be injured "in the course of his employment,"

> [w]ho else might be excluded (or included) was, as a matter of initial construction, impossible to say. After a half-century of litigation the answer to the riddle is not apparent. The Supreme Court has alternated between giving the term "seaman" an exceedingly broad construction and giving it a much

> narrower one. Consequently defendants have been encouraged to argue, in all but the most obvious cases, that plaintiff is not a Jones Act Seaman and that the action must be dismissed. Thus there has always been, there continues to be, and presumably there will go on being a substantial amount of depressing litigation of this type.

G. Gilmore & C. Black, *supra,* at 328.

A brief review of the later Supreme Court cases demonstrates that there are few clues as to what the critical factors are in determining crew status. In *Gianfala* v. *Texas Co.*, 350 U.S. 879 (1955), for example, the employee was a member of a drilling crew who performed his duties aboard a submersible drilling barge. He was killed while helping to unload drilling pipe onto the barge. The trial court denied the employer's motion for a directed verdict and held that the decedent's status was a question for the jury, which went on to find for the employee. The Fifth Circuit reversed, holding that as a matter of law the decedent was not abroad primarily to aid in navigation; the appellate court stated that he was aboard ship not as a member of the ship's crew, but as a member of the drilling crew doing work done only by oil field workers. Without discussion, the Supreme Court reversed the court of appeals and remanded the case to the district court with instructions to reinstate the judgment on the jury verdict in favor of the employee.

Two years later, in *Senko* v. *LaCrosse Dredging Corp.*, 352 U.S. 370 (1957), the Court decided that there was sufficient evidence to allow the jury to decide the question whether a handyman on a dredge who was injured on shore while placing a signal lantern into a shed was a member of a crew. The handyman had been employed only a short time and had never been on the dredge when

it was in transit, since it had not moved from anchorage. His duties, as recounted by the Court, required him to "clean and take care of the deck, splice rope, stow supplies, and, in general, to keep the dredge in shape." *Id.* at 372. In finding support for the jury's finding that he was a member of the crew of the dredge, the Court took into consideration these duties "to maintain the dredge during its anchorage and for its future trips," and concluded that he "would have a significant navigation function when the dredge was put in transit." *Id.* at 374.

The two most expansive readings of Jones Act coverage occurred in two short per curiam opinions. In *Grimes* v. *Raymond Concrete Pile Co.*, 356 U.S. 252 (1958), the employee worked as a pile driver assisting in the erection of a "Texas Tower," a radar station, 110 miles out at sea. During the time the tower was being towed out to its permanent site, the employee lived on the tower and kept it in condition prior to installation. After the tower was anchored at its permanent site, he worked only at pile driving. On the day of his injury, which was six days after the tower had been anchored, he was hurt while being transported in a navy life ring from a tug to the tower. The Supreme Court reversed the First Circuit and held that a sufficient evidentiary basis existed for a jury to decide whether the employee was a member of a crew of a vessel. The minority disagreed sharply, stating that there was "no room for debate that this individual is not a seaman, unless a 'seaman' is to mean nothing more than a person injured while working at sea." *Id.* at 225 (Harlan, J., dissenting).

Finally, in the last case in which the Court specifically addressed this issue, *Butler* v. *Whiteman*, 356 U.S. 271 (1958), the Court held that an employee doing odd jobs around his employer's wharf might be a seaman. The employee was killed when he fell off either a barge moored

to the wharf or a tug, which had been withdrawn from navigation, lashed to the barge. The Court reversed the First Circuit and remanded the case to the trial court for jury findings on three issues, including whether or not the decedent was "a seaman and member of the crew of the tug within the meaning of the Jones Act." *Id.* at 271. Justice Harlan, again writing for the minority, stated that "it taxes imagination to the breaking point to consider this unfortunate individual to have been a seaman at the time of the accident within the meaning of the Jones Act . . . ." *Id.* at 272-73 (Harlan, J., dissenting).

Diderot may very well have had the previous Supreme Court cases in mind when he wrote, "We have made a labyrinth and got lost in it. We must find our way out." In an attempt to extract some controlling principles from these cases and other relevant appellate court cases, Judge Wisdom in *Offshore Co.* v. *Robison,* 266 F.2d 769 (5th Cir. 1959), concluded that

> there is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.

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[3] The first part of the *Robison* test synthesized then-existing case law corresponding to the first two parts of the traditional three-prong test, and the second part synthesized then-existing case law corresponding to the third part of the three-prong test.

266 F.2d at 779 (footnote omitted). The *Robison* test[3] has been accepted by many courts not only as a test of whether a case should go to the jury in a Jones Act dispute, but also as a test to be used "in delimiting the power of the factfinder to deny or confer [seaman's] status." *McDermott, Inc.* v. *Boudreaux,* 679 F.2d 452, 457 (5th Cir. 1982). Still, some courts start with the three-prong test and do not apply the liberal construction given to all parts of that test by *Robison. See Simko* v. *C & C Marine Maintenance Co.,* 594 F.2d 960, 964-65 (3d Cir. 1979); *Griffith* v. *Wheeling Pittsburgh Steel Corp.,* 521 F.2d 31, 36-38 (3d Cir. 1975), *cert. denied,* 423 U.S. 1054 (1976).[4]

III.

The district court in this case applied the traditional three-prong test without reference to the *Robison* reformulation of that test. It noted that the parties were in agreement that there was a material question of fact on the issue whether appellant, at the time of his injury, had a more or less permanent connection with the JFB-15. On the other two issues, the district court found that the vessel was not in navigation at the time appellant was injured, and that his duties were not primarily in aid of navigation; the court observed that appellant was employed as an ironworker and that his duties were those of an ironworker: "The fact that he did occasionally aid the deck hands in securing JFB-15 at various locations was a casual undertaking which was wholly coincidental to the achievement of the purpose for which he and his gang were employed."

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[4] The Fifth Circuit, which developed *Robison,* also sometimes quotes a hybrid version in which the first two elements of the three-prong test are addressed in conjunction with the last element of the *Robison* test. *See Bertrand* v. *International Mooring & Marine, Inc.,* 700 F.2d 240, 244 & n.9 (5th Cir. 1983).

Appellant contends that the district court erred in both these findings and that it should have submitted the issues to the jury. In particular, appellant objects to the district court's failure to apply the *Robison* test, under which appellant's duties aboard the JFB-15 undoubtedly contributed to its "mission," as that term was applied in *Robison* and as the cases following *Robison* have interpreted it, *see, e.g., Bennett* v. *Perini Corp.*, 510 F.2d 114, 116-17 (1st Cir. 1975), of providing a support base for the construction of the lift section of the bridge and the control house.

Although the *Robison* formula devised by Judge Wisdom is based on a well-reasoned attempt to extract relevant principles from then-existing case law, the formula has been appropriately described an an "analytical starting point rather than a self-executing formula." *Brown* v. *I.T.T. Rayonier, Inc.*, 497 F.2d 234, 237 (5th Cir. 1974). We think that the starting point provided by *Robison* is in most respects sound; however, we think that its restatement of the third prong of the traditional test (that the employee's duties must be primarily in aid of navigation), especially as *Robison's* restatement has been interpreted by courts subsequently,[5] is too broad in that it accords insufficient weight to the relationship between the employee and the *transportation function* of the vessel. More specifically, we think the second part of the *Robison* test strays from important Jones Act principles when it speaks of the employee's duties as having to relate only to the "function of the vessel or the accomplishment of its mission" without further qualifying "function" and "mission" in terms of the *transportation* function and mission of the vessel. The *Robison* court's failure to qualify this requirement may have stemmed from attach-

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[5] For an example of how the failure to qualify this language leads, in our view, to an overly broad reading of "crew" status, see *Bennett* v. *Perini Corp.*, 510 F.2d 114, 116-17 (1st Cir. 1975).

ing too much importance to the facts in the Supreme Court's few short per curiam opinions—*Gianfala, Grimes,* and *Butler*—and giving insufficient consideration and weight to the Supreme Court's earlier explicit statements and the thrust of its opinion in *Senko.*

Only *Gianfala, Grimes,* and *Butler,* of the Supreme Court cases, appear to be anomalous in giving insufficient attention to the employee's duties as they relate to the transportation function of the vessel (insofar as this lack of attention is revealed by the facts in those cases); all were decided without extended discussion. Other Supreme Court cases, however, emphasize the duties of the employee as they relate to the operation and welfare of the vessel *as a vessel*—as a means of transport on water. In *Senko,* for example, the Court discussed the issue fully and emphasized the navigational tasks performed by the employee. This is consistent with the Supreme Court's earlier emphasis in *Bassett* and *Norton* on duties tied to the transportation function of the vessel as essential to a finding that an employee is a member of the crew.

We think *Senko's* emphasis on "significant navigational functions" and *Bassett* and *Norton*'s emphasis on activities contributing to the operation and welfare of the vessel as a means of transport on water are critical to jurisdiction under the Jones Act. Because a Jones Act "seaman" is one who is a member of a *crew of a vessel, see Senko,* 352 U.S. at 371, and because a "vessel" under the Jones Act, while interpreted liberally, has been consistently defined as a floating structure that must have as one of its functions the *transportation* of personnel or materials across navigable waters, *see Powers* v. *Bethlehem Steel Corp.,* 477 F.2d 643, 647 (1st Cir. 1973), we believe it is the employee's relation to the transportation function of the vessel, *i.e.,* whether the employee contributes to the maintenance, operation, or navigation of the

vessel as a means of transport on water, that is critical for Jones Act purposes. Such an interpretation fulfills what we believe to be the central purpose of the Act: to provide protection for those subjected to risks associated with the transportation function of vessels on navigable waters.

This view is consistent with the approach the Third Circuit has taken in more narrowly construing the "primarily in aid of navigation" requirement. In *Griffith* v. *Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir. 1975), for example, the court noted that the only navigational function performed by the employee was that he assisted in the throwing of lines from one barge to the other while they were being "rounded," a procedure used in moving loaded barges away from the seawall. It characterized these tasks as "insignificant" navigational functions, *id.* at 37-38, and held that these duties could not support "seaman" status.

This approach was reaffirmed in *Simko* v. *C & C Marine Maintenance Co.*, 594 F.2d 960 (3d Cir. 1979). There, the court stated that:

> The clear import of our opinion in *Griffith* is that a maritime worker who does not actually go to sea but who is injured while performing duties on a navigable vessel must establish that he performed significant navigational functions with respect to that vessel in order to recover under the Jones Act.

Id. at 964-65. The court concluded that the injured employee failed to perform such functions, as his duties were limited to the cleaning and minor repairs of barges brought to his employer's facilities. *See also Lynn* v. *Heyl and Patterson, Inc.*, 483 F. Supp. 1247, 1250-52 (W.D. Pa. 1980); *Mellon* v. *John F. Beasley Construction Co.*, 1981 A.M.C. 549, 555 (D. Md. 1980).

No doubt one of the reasons courts originally gave a liberal interpretation to "crew" status was to cover new categories of workers such as off shore-oilmen. Indeed, in *Robison*, Judge Wisdom hinted that a broad reading of the Jones Act was necessary to give such workers, who in "many instances . . . are exposed to more hazards than are blue-water sailors," protection. 266 F.2d at 780. He observed: "They run the risk of top-heavy drilling barges collapsing. They run all the risks incident to oil drilling." *Id.* While such categories of workers previously may have fallen through the cracks of existing compensation schemes, they are now protected through the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(b), which incorporates the coverage of the LHWCA. Another obvious reason for the broad interpretations of crew member status under the Jones Act is that recoveries under the Jones Act have generally been considerably greater than those available under state workmen's compensation schemes or the LHWCA.[6] Since the 1972 amendments to the LHWCA, however, awards under the LHWCA have increased substantially, thus removing some of the equitable economic reasons for construing the Jones Act broadly.

While the liberal attitude of courts in finding employees of questionable status "seamen" may be commendable when the employee's duties fall into the gray areas, we believe the purpose of the Jones Act is distorted when persons who are obviously not seamen recover damages

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[6] Benefits under the LHWCA for loss of a leg (the injury suffered by appellant here), assuming only partial disability, are the lesser of 200% of the national average weekly wage or two-thirds of the employee's average weekly wage, to be paid over a period of 288 weeks. *See* 33 U.S.C. §§ 906, 908. Typical tort damages under the Jones Act because of the generous attitude of jurors, would normally be higher than the total recovery under the LHWCA.

at the ship owner's expense. If the Jones Act is to retain any limitations on its coverage, we believe the employee's duties with respect to the transportation function of the vessel should define them. We conclude that when the person's status as a member of a crew is equivocal, "the work done by [the] employee will be crucial . . . ." *Braen* v. *Pfeifer Transportation Co.*, 361 U.S. 129, 131 (1959). Relying on the traditional three-prong test, but emphasizing the employee's duties as they relate to the transportation function of the vessel, we hold that in these equivocal situations there is an evidentiary basis for submitting to the jury the question whether the person was a member of the crew of a vessel at the time of injury if: (1) the person injured had a more or less permanent connection with a vessel in navigation, and (2) the person injured made a significant contribution to the maintenance, operation, or welfare of the transportation function of the vessel.

Applying these guidelines to the present facts, we must conclude that while appellant's activities fall within the ambit of part 1, they fail to meet part 2. As for part 1, the district court acknowledged that the parties stipulated that there are facts suggesting that appellant had a more or less permanent connection with the JFB-15,[7] but it concluded that the JFB-15 "was not a vessel in navigation in the context of the event of plaintiff's injury." Although recognizing that in a different factual setting the JFB-15

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[7] The requirement of a relatively permanent tie to the vessel is meant to deny seaman's status to those who come aboard a vessel for an isolated piece of work, not to deprive a person whose duties are truly navigational of Jones Act rights merely because he serves aboard a vessel for a relatively short period of time.

Porche v. *Gulf Mississippi Marine Corp.*, 390 F. Supp. 624, 631 (E.D. La. 1975).

might be considered to be a vessel in navigation, the court reasoned that at the time of injury it could not be considered so.

> It was at that time a stationary platform secured to the falsework near the river bank. Its only function was that of a platform to facilitate the erection of structural steel. Although it was floating upon a navigable stream, it cannot be found to have been in navigation.

We believe the approach adopted by the district court was in error. The "vessel in navigation" requirement pertains not to the vessel's mobility at the precise moment of injury, but to whether it has at times been employed as a means of transport on water for passengers or cargo and has not been withdrawn from navigable waters and laid up, say, for the season. The "vessel in navigation" requirement is, like the second part of our test, aimed at determining the injured party's status as a member of a "crew." Any floating structure, including those designed for special purposes, is a "vessel" capable of having a maritime "crew" so long as the structure at some time serves as a means of transport on water. "To be a vessel, the purpose and business must to some reasonable degree be the 'transportation of passengers, cargo, or equipment from place to place across navigable waters.'" *Bennett* v. *Perini Corp.*, 510 F.2d 114, 116 (1st Cir. 1975) (quoting *Powers* v. *Bethlehem Steel Corp.*, 477 F.2d 643, 647 (1st Cir.), *cert. denied*, 414 U.S. 856 (1973)). If the waterborne structure serves no transportation function,[8]

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[8] About the only floating structures unable to act as a means of transport on water are off-shore drilling platforms, *see, e.g., Thompson* v. *Crown Petroleum Corp.*, 418 F.2d 239, 240 (5th Cir. 1969), and dry docks or floating docks that are regarded as nothing more than extensions of land, *see, e.g., Cook* v. *Belden Concrete Products, Inc.*, 472 F.2d 999, 1001-02 (5th Cir.), *cert. denied*, 414 U.S. 868 (1973); *Keller* v. *Dravo*, 441 F.2d 1239, 1244 (5th Cir. 1971), *cert. denied*, 404 U.S. 1017 (1972).

of course, it can have no group performing navigational functions, and hence no maritime "crew."[9]

Similarly, the injured employee does not cease becoming a member of a crew if the vessel is docked or anchored at the moment of injury.

> As properly construed, the "in navigation" requirement is used in its broad sense, and is not confined strictly to the actual navigating or movement of the vessel, but instead means that the vessel is engaged as an instrument of commerce or transportation on navigable waters. [Citation omitted.] Indeed, so long as the vessel is upon navigable waters, an injured Jones Act seaman may recover for injuries suffered while on the wharf. [Citations omitted.]

Griffith, 521 F.2d at 37. So long as at the time of injury the vessel was not removed indefinitely or for the season, the employee is still considered part of its "crew," if all the other requirements are fulfilled.

In this case, the JFB-15 was clearly a "vessel in navigation." It was used to transport steel materials on the river and had not been withdrawn from the waters at the time of appellant's injury. The district court erred in granting summary judgment for Beasley on this ground.

We conclude, however, that appellant fails to meet the second part of our test. The only evidence suggesting that appellant contributed to the transportation function of the JFB-15 was the statement that he may have thrown or fastened some mooring lines. We think that this task was insignificant with respect to the operation and welfare of the transportation function of the JFB-15. *See Griffith*,

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[9] The definition of "vessel" for purposes of our test is thus inextricably intertwined with the second part of our test requiring the injured employee to have held duties connected with the transportation function of the waterborne structure.

521 F.2d at 37; *Lynn*, 483 F. Supp. at 1252. The persons who were involved with the transportation function of the JFB-15, its "crew" as it were, were the operators of the work boats and tugs and the deckhands assigned to them that pushed the JFB-15 on the river. Appellant's duties were unrelated to this operation. He was an ironworker hired as a foreman charged with constructing part of the bridge. That he performed the ironwork construction on navigable waters aboard the JFB-15 does not make him a member of the crew charged with the operation and welfare of the JFB-15 as a means of transport on water.

IV.

On these facts, there is no evidentiary basis for submitting this issue to the jury, and we accordingly affirm the decision of the district court granting Beasley's motion for summary judgment.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

CERTIFICATE OF SERVICE

Pursuant to Rule 28 of the Supreme Court of the United States the undersigned certifies that a copy of the foregoing Petition for Writ of Certiorari including Appendix was served upon the parties of record by mailing to the following Attorneys of Record at their addresses as disclosed by the Pleadings of Record herein by depositing same in a United States mailbox, at Peoria, Illinois, with first-class postage prepaid, addressed to counsel of record at his post office address on the 8th day of November, 1984.

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CLERK

No. 84-903

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HUBERT WAYNE JOHNSON,
Petitioner,

v.

JOHN F. BEASLEY CONSTRUCTION COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Should the Supreme Court review the decision of the district court and the court of appeals which, consistent with established precedent and sound reasoning, held as a matter of law that an ironworker, who was injured while supervising the construction of a control house for a railroad bridge on navigable waters, was not a seaman under the Jones Act?

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v.

JOHN F. BEASLEY CONSTRUCTION COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

The Respondent does not dispute the portions of the Statement of the Case of the Petitioner which pertain to the proceedings in the district court and the court of appeals. However, the Petitioner's description of the circumstances surrounding his accident omits many undisputed, yet material, facts contained in the record, which are essential to convey to the Court the full flavor of his activities both prior to and at the time of his injury.

Moreover, the petitioner has, from the inception of the litigation, attempted to put a maritime gloss on a construction accident by insisting that he was the victim of a collision between vessels on navigable waters that calls for Jones Act application. Accordingly, the Respondent submits the following statement of facts which more fully and accurately describes the status of the Petitioner during the course of his employment by it. This statement is, in somewhat abbreviated form, the same on which the Respondent relied in the courts below. It is based entirely on the Petitioner's own testimony on deposition, as well as on the Respondent's construction records, explained in an affidavit by its superintendent.

The Petitioner was injured on July 13, 1981, while employed by the Respondent as a foreman on a job involving the construction/modification of the Illinois Central Gulf Railroad Bridge over the Illinois River near Pearl, Illinois. He had worked for the Respondent off and on since graduation from high school in 1962 and more or less steadily since 1971. He had been on many of the Respondent's construction projects both on land and above navigable waters. His only union affiliation was with the International Association of Bridge, Structural and Ornamental Iron Workers. Specifically, he had never belonged to any seaman's or maritime union and held no licenses issued by the U.S. Coast Guard or any other governmental agency.

The Respondent engages in the erection of steel in connection with multi-story structures such as office buildings, bridges, industrial developments, power stations, industrial smoke stacks and antenna towers. On the job at Pearl, the Respondent was a subcontractor to Vincennes Steel Corporation. Vincennes, in turn, was a subcontractor to the general contractor, Massman Construction Company, having agreed to fabricate and erect the steel. The erection portion Vincennes had subcontracted to the Respondent.

James McGraw was the superintendent on the construction site overseeing all aspects of the Respondent's performance of the subcontract. Directly under him was Norman J. Cantrell, the general foreman, who directly supervised the activities of a number of construction gangs in the field, each headed by an ironworker foreman. The Petitioner was one of these foremen. His gang was essentially a raising gang, consisting of several ironworkers acting as hook-on men at ground level and connectors on top of the bridge, as well as an operator and an oiler for a crane which supplied the main lifting power for the gang.

The Respondent employed three trades on the job site. There were ironworkers, whose primary function was the actual raising of the iron and its assembling and securing on the bridge. There were also members of the operating engineers' union, which provided operators and oilers for the hoisting cranes or derricks, as well as for the tugs and work boats used on the job. Finally, there were general laborers who made up the unskilled work force and also acted as deckhands on the tugs and work boats used in the movement of personnel and of various barges. The operators of the tugs and work boats and the deckhands assigned to each performed the actual maritime chores at the construction site. These chores consisted of such things as attending barges during movement, acting as look-out, "facing up", mooring, checking the winches holding the barges to the tug, setting lights, and doing general maintenance. Although the Respondent cannot dispute that on occasion the Petitioner and his fellow ironworkers may have handled a mooring line, such activity was at best incidental and subservient to their bridge-building activities. It specifically denies the conclusory statement on page 9 of the Petition "that the Defendant admits Plaintiff performed some traditional navigational functions."

Because the bridge alteration took place some distance above the water surface, the Respondent employed three floating derricks, one of which was called the 3900. The 3900 consisted of a steel flat-deck barge, denominated the JFB-15, upon which had been placed a rented Manitowoc crawler crane. The JFB-15 measured 135 feet by 40 feet by 8 feet and displaced 405 tons. It had been constructed for the Respondent to be used primarily as a construction platform. It had raked ends and was subdivided into six watertight compartments which could be separately ballasted to allow changes in its trim, list or draft/ freeboard. It had none of the features usually found in a vessel: it had no engines, no shaft, no propeller, no helm or rudder, no kitchen or galley, no permanent toilet facilities, and no permanent navigation lights. There were no day or night accommodations, and drinking water and food had to be carried on from shore. Neither the Petitioner nor, for that matter, anyone else ever slept on the barge, and at quitting time, he and the members of his gang would be taken ashore by boat. The Petitioner, incidentally, lived with his family in rented quarters in Pittsfield, Illinois, some 20 to 25 miles from Pearl and commuted to the construction site every workday by automobile.

The JFB-15 was brought to the job site on or about June 29, 1981, for a dual purpose: assembly of a control house for the bridge on the deck of the barge itself, and construction of the truss of the lift span on top of falsework — tall, tower-like steel braces set upon pilings which had been driven into the river bottom on the west bank of the Illinois River.

The principal reason for the entire bridge project was to improve the navigability of the Illinois River. The existing bridge had a center swing span resting on a pier-supported turn table, which, by its very nature, created an obstruction in the center of the navigation channel. The Respondent's contract called for the removal of the swing

span and replacing it with a lift span, thereby removing the obstruction in the river. Because the channel of the river had to remain open to navigation during the time the lift span was under construction, the latter had to be assembled on the west bank of the river on falsework downstream from the bridge crossing. The lift span truss was some 420 long and weighed approximately 1100 tons. Following its construction, the lift span was to be floated into the gap left by the removal of the swing span and then maneuvered into place. Construction of the control house and the lift span truss was the task assigned to the Petitioner and his gang, using the 3900 to provide the hoisting capability.

The Respondent's records reveal, in the language of the construction trade, the Petitioner's activities on each day from the time he assumed his duties as ironworker foreman on the construction site on Monday, June 29, 1981, until his injury on July 13, 1981, at about 2:00 p.m. On the 29th of June, 1981, he worked with his gang utilizing the 9299, another crane on the construction site, "rolling in and out", *i.e.*, removing two simple spans immediately adjacent to the swing span and replacing them with foundations of two steel towers which were to support the new lift span. This work continued on June 30, 1981, with the same equipment. On July 1, 1981, the Petitioner's gang worked 23 hours, once again rolling in and out. All of this work was performed on top of the bridge piers using the crane moored in the river as a supporting tool. On Thursday, July 2, 1981, the Petitioner's gang unloaded iron into barges. The hoisting equipment utilized that day is not identified.

No work took place on the construction site during the period of July 3-5 because of the long Fourth of July weekend. On Monday, July 6, 1981, the records reveal the Petitioner's gang unloading iron with the 3900. That rig had arrived on the work site on June 29, 1981, but had not

gone into action prior to July 6, 1981. The iron being unloaded was to be used in the construction of the control house for the lift span.

On July 7 and 8, the erection of the control house continued, and on those days the rig was tied to falsework on the west bank. However, construction had to be interrupted on July 9, 1981, when, because of ever-rising water levels, it became apparent that further unloading of iron for the bridge construction from trucks was no longer possible at Pearl. Mr. McGraw learned of a ferry crossing 14 miles south of the construction site at Kampsville, Illinois, where trucks could still be brought near enough to the river bank to be reached by the boom of one of the Respondent's cranes. Because the other rigs were being used in dismantling the approach spans of the bridge, Mr. McGraw decided to use the 3900, and he gave orders for it to be pushed downstream by the Beasley Tug IRON WORKER.

Mr. McGraw himself rode the rig down-river to the ferry crossing. This trip took some two and one half hours, during which the Petitioner and the members of his gang fulfilled no navigational tasks. When the JFB-15, with the 3900 secured to its deck, arrived at Kampsville, one or more lines were run from the barge to the shore. The deckhand of the tug and some of the ironworkers did assist in that task. Subsequently, while awaiting the arrival of the first materials trucks, the ironworkers prepared their tools and lifting equipment.

The unloading operation was not finished on July 9, and it was therefore necessary to send a company truck to Kampsville to get the Petitioner and his men back to Pearl. The unloading operation continued and was completed on July 10, 1981. While the two loaded hopper barges were left at the ferry crossing to be picked up after the weekend, the tugboat brought the 3900 back to Pearl,

where it was secured to falsework on the west bank of the river. The Respondent's records suggest that the Petitioner left Kampsville over the road, rather than returning by water; however, contrary to the Petitioner's records and the recollection of Mr. McGraw, who made the return trip on the tug, the Petitioner claims that he stayed with the 3900 during the return trip to Pearl. Even if that is correct, however, his own testimony shows that his concern was not the navigation of the flotilla, but the preparation of the iron for raising.

On Monday, July 13, 1981, following a safety meeting, the Petitioner and his men returned to the JFB-15 in order to resume construction of the control house. The accident happened at about 2:00 p.m., while the Petitioner was standing on the deck of the barge between the 3900 and the almost completed control house. He was speaking to one of the men in his gang about a structural member of the control house that evidently had not been properly fitted. In the immediate vicinity, there was lying on the deck a net beam measuring 30 feet by 12 inches and weighing close to 2,000 pounds which apparently was protruding some distance over the off-shore side of the JFB-15. At the same time, the Tug IRON WORKER was bringing the two materials barges, which had previously been loaded and left at the Kampsville ferry crossing, abreast of the JFB-15. In the process, the forward portside corner of the lead barge snagged the net beam and moved it across the deck. It came to rest against the timberhead (a type of bollard) on the offshore side of the JFB-15, with the result that it pivoted, catching the Petitioner's left foot and injuring him.

REASONS FOR DENYING THE WRIT

I.

INTRODUCTION

This case involves yet another attempt by an ironworker building a structure on or over navigable waters to bring himself within the coverage of the Jones Act, as distinguished from compensation remedies available to him under applicable federal and/or state statutes, by contending that he was a seaman. After a careful examination of the Statute and the cases decided thereunder both by this Court and several courts of appeals, and after reviewing the facts in the light most favorable to the Petitioner, the United States District Court for the Central District of Illinois and the United States Court of Appeals for the Seventh Circuit held, as a matter of law, that the Petitioner was not a seaman. The decision of the Seventh Circuit is not in conflict with any decision of this Court or any of the courts of appeals and properly reflects public policy. There are no important reasons for hearing this case. Accordingly, the Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

II.

ARGUMENT

THE SEVENTH CIRCUIT'S DECISION DENYING PETITIONER JONES ACT SEAMAN STATUS AS A MATTER OF LAW WAS ENTIRELY CORRECT IN THAT IT IS CONSISTENT WITH EARLIER DECISIONS BY THIS COURT, IS IN ESSENTIAL HARMONY WITH THE LAW IN THE CIRCUITS AND EXPRESSES SOUND PUBLIC POLICY.

The Petitioner contends that the Seventh Circuit created a new test to determine seaman status which is not only ambiguous and confusing, but contradicts precedent set by this Court and is also in conflict with decisions

by other courts of appeals. Nothing could be further from the truth!

A. The Supreme Court's Definition Of Seaman Status Focuses On Vessels And Vessel-Related Activities.

While the Jones Act, 46 U.S.C. § 688, does not define the word "seaman", this Court first made it clear in *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1 (1946), and later affirmed in *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1957), that it is synonymous with "member of the crew of any vessel", the wording of the exception to coverage under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901 *et seq.* Thus, after some initial doubt expressed in *International Stevedoring Co. v. Haverty,* 272 U.S. 50 (1926), it was held that those engaged in maritime employment are divided into two distinct groups, seamen and harborworkers, with separate statutory schemes to protect each.

Even before *Swanson v. Marra Brothers, Inc., supra,* this Court rendered two decisions which draw the line between "seamen" on the one hand, and "harborworkers" on the other. In *South Chicago Coal & Dock Company v. Bassett,* 309 U.S. 251 (1940), it was held that a seaman is someone who is on the vessel naturally and primarily to aid in her navigation. Soon afterwards, in *Norton v. Warner Co.,* 321 U.S. 560 (1944), the Court, fearful perhaps that the *South Chicago Coal* definition might be construed too narrowly by the lower courts, explained that "aiding in navigation" was not confined to "putting over the helm" or to "handing, reefing and steering", but embraced duties essential for other purposes of the vessel. Thus, it can no longer be seriously doubted that, for instance on a passenger vessel, seamen are not only those who navigate, tend deck or operate the engines, but also those who work in the catering and steward departments.

Since the *Norton* decision in 1944, this Court has been called upon on four other occasions to decide whether or not a claimant, as a matter of law, should be accorded seaman status: *Gianfala v. Texas Co.*, 350 U.S. 879 (1955); *Senko v. LaCrosse Dredging Corp., supra; Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958); and *Butler v. Whiteman*, 356 U.S. 271 (1958). Of these cases, however, only *Senko* sheds any light on this Court's reasoning. There, it was held that it was for the jury to decide whether a deckhand on a dredge was a seaman, where his primary job was to load, unload and maintain the dredge, where he was employed almost solely on the dredge, where he was to have significant navigational functions on the dredge once it got underway, and where he was injured while performing a task beneficial to the dredge.

B. The Two Principal Tests Of Seaman Status Developed And Presently Used By The Courts Of Appeals Implement The Supreme Court's Standard And Provide Appropriate Starting Points For Jones Act Analysis.

The various courts of appeals have taken the parameters laid down by the Supreme Court and forged them into two basic tests. After *South Chicago Coal* and *Norton, supra,* but before *Gianfala, Senko, Grimes* and *Butler, supra,* the Sixth Circuit, in *Wilkes v. Mississippi River Sand & Gravel Co.*, 202 F.2d 383 (6th Cir. 1953), developed a three-prong test that was described by the Seventh Circuit in its opinion below as "the touchstone of Jones Act analysis": (1) that the vessel be in navigation; (2) that the worker have a more or less permanent connection with the vessel; and (3) that he be aboard primarily to aid in navigation. Shortly after the *Butler* decision in 1958, the Fifth Circuit, in a further attempt to get a handle on the concept of seaman status, in *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959), developed a two-prong test evidently intended to refine the *Wilkes* test and to reflect the decisional law of the day: (1) that the

injured worker be assigned permanently to a vessel (including special purpose structures not normally thought of as vessels, in obvious deference to new types of craft coming into common use in the developing off-shore industry) or performed a substantial part of his work on the vessel; and (2) that the injured worker perform in a capacity contributing to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movements or anchorage for its future trips.

Both of these tests remain in use today, not only to determine whether a case should go to the jury, but also to be used "in delimiting the power of the factfinder to deny or confer seaman's status." *McDermott, Inc. v. Boudreaux,* 679 F.2d 452, 457 (5th Cir. 1982). In the past, the Third and Fourth Circuits have applied the three-prong test of *Wilkes,* whereas the First and Fifth Circuits have applied the *Robison* test. In addition, the Fifth Circuit has occasionally used a variation in which the first two elements of the three-prong *Wilkes* test are addressed in conjunction with the last element of the *Robison* test. *See Bertrand v. International Mooring & Marine, Inc.,* 700 F.2d 240 (5th Cir. 1983).[1] Whichever of the tests is used,

[1] Construction worker cases from these Circuits have denied Jones Act status as a matter of law. *See Griffith v. Wheeling-Pittsburgh Steel Corp.,* 521 F.2d 31 (3rd Cir. 1975), *cert. denied,* 413 U.S. 1054 (1976); *Lynn v. Heyl and Patterson, Inc.,* 483 F. Supp. 1247 (W.D. Pa. 1980), *aff'd,* 636 F.2d 1209 (3rd Cir. 1980); *Mellon v. John F. Beasley Construction Company,* 661 F.2d 924 (4th Cir. 1981), *cert. denied,* 454 U.S. 1033 (1981); *Whittington v. Sewer Construction Co., Inc.,* 541 F.2d 427 (4th Cir. 1976); *Bellomy v. Union Concrete Pipe Co.,* 297 F. Supp. 261 (S.D. W.Va. 1969), *aff'd,* 420 F.2d 1382 (4th Cir. 1970), *cert. denied,* 400 U.S. 904 (1970); *Longmire v. Sea Drilling Corp.,* 610 F.2d 1342 (5th Cir. 1980); *Holland v. Allied Structural Steel Co., Inc.,* 539 F.2d 475 (5th Cir. 1976), *cert. denied,* 429 U.S. 1105 (1977). Only *Bennett v. Perini Corp.,* 510 F.2d 114 (1st Cir. 1975), has held that Jones Act status is a question of fact to be decided by the jury.

however, it is clear that they are not "the law", but, as the Fifth Circuit itself has pointed out in *Brown v. I.T.T. Rayonier, Inc.*, 497 F.2d 234, 237 (5th Cir. 1974), "an analytical starting point rather than a self-executing formula."

C. The Test Of The Seventh Circuit Is Entirely Consistent With The Decisions Of This Court And Does Not Conflict With The Decisions Rendered By Other Courts Of Appeals.

Judge Wood, the author of the Seventh Circuit's opinion below,[2] noted initially that his court had not been called upon frequently to decide disputes involving Jones Act status. Consequently, he commendably availed himself of the opportunity to lend his considerable analytical skills to examine the law "from the grass roots up". He noted approvingly that the district judge, in deciding that the Petitioner was not a Jones Act seaman as a matter of law, had applied the three-prong *Wilkes* test, but he also described the *Robison* test as a "sound starting point in most respects", his reservation obviously stemming from the lack of mathematical clarity of terms such as "function of the vessel" or "accomplishment of its mission" contained therein. Judge Wood concluded that more precise meanings would have to be found for these categories to render them useful, lest everyone working on water should claim seaman status, with the result that the judicial clock be turned back to pre-*Swanson* days. He found that practically all vessels, regardless how specialized, are designed to carry personnel, materials or equipment over navigable waters, *i.e.* have a transportation function, and concluded that only those who are on board to aid that function are

[2] 742 F.2d 1054

seamen entitled to Jones Act protection. All others are either longshoremen and harbor workers or off-shore workers entitled to the increasingly generous benefits of federal statutes, such as the LHWCA or the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1333(b), or they are land-based workers protected by the workers' compensation statutes of the coastal states. Legal support for that analysis came from this Court's decisions in *South Chicago Coal, Norton* and *Senko, supra.* Thus, the Seventh Circuit's emphasis on the vessel's transportation function is by no means a new test, but simply a re-examination of existing standards, yielding a component rendering them easier of application and, as a result, making them more useful, all fully consistent with the pronouncements by this Court.

D. The Decision Of The Seventh Circuit Is In Every Respect Correct And Reflects Sound Public Policy.

1. *No jury question was presented.*

Frequently, the determination whether an injured worker is a Jones Act seaman is a mixed question of law and fact, and where material facts are in dispute, the resolution must ordinarily be made by the trier of fact, after all the evidence has been examined. *Offshore Co. v. Robison, supra; Braniff v. Jackson Avenue Gretna Ferry, Inc.,* 280 F.2d 523 (5th Cir. 1960). Where, however, as in this case, the material facts are undisputed and only one rational inference can be drawn from the evidence, it was incumbent on the lower courts to resolve the question as a matter of law. *Barrios v. Engine & Gas Compressor Services, Inc.,* 669 F.2d 350 (5th Cir. 1982); *Beard v. Shell Oil Company,* 606 F.2d 515 (5th Cir. 1979); *Owens v. Diamond M. Drilling Company,* 487 F.2d 84 (5th Cir. 1973); *Producers Drilling Company v. Gray,* 361 F.2d 432 (5th Cir. 1966); *Lawrence v. Norfolk Dredging Company,* 319 F.2d 805 (4th Cir. 1963); *Rotolo v. Halliburton*

Company, 317 F.2d 9 (5th Cir. 1963); and *Hill v. Diamond*, 311 F.2d 789 (4th Cir. 1962). Not even under the most liberal construction of any of the tests used by the courts to determine seaman status can the Petitioner claim Jones Act coverage: he was an ironworker foreman assigned the task of assembling the component parts of a bridge, an activity which was carried out on a floating work platform for the sake of efficiency, but could have been carried out equally well on dry land without changing the hazards concomitant with heavy construction work. Instead of by an approaching barge, the net beam that pinned Petitioner's foot could have been as easily snagged by a moving truck. If it was the mission of the JFB-15 to support the construction activity, then the Petitioner, as the very perpetrator of that activity, did nothing to support that mission; rather, that support was rendered by the workers manning the tugs and workboats at the construction site, who were given responsibility for the moving and maintaining of the Respondent's floating equipment. The Petitioner's occasional throwing of a mooring line provided, as the Fifth Circuit said in *Thibodeaux v. J. Ray McDermott & Co.*, 276 F.2d 42, 47 (5th Cir. 1960), "insufficient legal buoyance to float a seaman status".

2. *Considering the manner in which the law has developed in recent years, maritime construction workers do not require Jones Act protection.*

The Federal Courts have long considered "poor and friendless" seamen "wards of the admiralty". Gilmore & Black, *The Law of Admiralty*, p. 281 (2nd Ed. 1975). When the oil industry first expanded its activities from dry land to the ocean floor, there was perhaps justification for the postulation of broader Jones Act coverage, lest newly created categories of workers, which were not otherwise protected, "fall between the cracks". Yet, as Judge Wood has pointed out, that situation, if in fact it ever existed,

has drastically changed with the passage of such statutes as the OCSLA and the coverage of accidents in coastal waters now afforded by the compensation statutes of the littoral states.

3. *The Petitioner's desire for greater financial reward does not constitute sufficient reason to grant him Jones Act status.*

Although one might sympathize with the victim of a serious accident attempting to improve his financial lot by breaking the restraints of compensation coverage in favor of the limitless coverage of the Jones Act, the employer, initially, and society, ultimately, would be called upon to pay an inordinate price, either through lack of insurance cover or, conversely, unnecessary multiple layers of insurance, if an ironworker engaged in a bridge building activity, who has been traditionally covered by workers' compensation, succeeds in having himself declared a Jones Act seaman, or being even permitted to have that question determined by a jury. Failure to resolve that question in the employer's favor as a matter of law, except in decidedly grey areas, would, as Judge Wood put it, "[distort] the purpose of the Jones Act."

E. The Supreme Court Has Not Heretofore Granted Writs Of Certiorari In Cases Of Construction Workers Claiming To Be Jones Act Seamen.

Since its *Butler* decision in 1958, this Court has been called upon on numerous occasions to grant review of decisions by the various courts of appeals holding in each instance that the appellant is not a Jones Act seaman as a matter of law. Some of these cases involve, as the instant case, workers building structures on or above navigable waters. *Mellon v. John F. Beasley Construction Company*, 661 F.2d 924 (4th Cir. 1981), *cert. denied*, 454 U.S. 1033 (1981); *Holland v. Allied Structural Steel Co., Inc.*, 539

F.2d 475 (5th Cir. 1976), *cert. denied,* 429 U.S. 1105 (1977); *Griffith v. Wheeling-Pittsburgh Steel Corp.,* 521 F.2d 31 (3rd Cir. 1975), *cert. denied,* 423 U.S. 1054 (1976); and *Bellomy v. Union Concrete Pipe Co.,* 297 F. Supp. 261 (S.D. W.Va. 1969), *aff'd,* 420 F.2d 1382 (4th Cir.), *cert. denied,* 400 U.S. 904 (1970). Although the Court's reasons for denying the writ in each of these cases are not stated and, therefore, unknown, one may presume that the Court is satisfied that the guidelines laid down by it in earlier decisions are heeded by the lower courts, and that the tests developed by them in response thereto are generally producing fair and equitable results. No doubt, yet another definition of "seaman" could be devised, but as with any verbalization of human thought, it may well create as many problems as it solves.

CONCLUSION

The holding of the district court and the Seventh Circuit that the Petitioner, an ironworker injured on a floating work platform held to have been a vessel in navigation by the Seventh Circuit, while supervising the construction of a component part of a bridge, and even prior to his accident having engaged in no vessel-related activities other than throwing an occasional mooring line, was not a Jones Act seaman, was entirely correct and in harmony with the intent of the Statute, as well as the decisional law of this Court and the various courts of appeals.

Accordingly, the Petition for Writ of Certiorari should be denied.

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